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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 JODIE JEWETT,

20 Plaintiff,

21 vs.

22 BISHOP WHITE MARSHALL & WEIBEL,
23 P.S., AND DOES 1-10,

24 Defendants.

No. CV 12-10142 PSG(MRWx)

DEFENDANT'S OBJECTION AND
REQUEST TO STRIKE PLAINTIFF'S
REPLY IN SUPPORT OF EX PARTE
MOTION

Assigned to Hon. Philip S. Gutierrez

Courtroom: 870/880

25 Defendant Bishop, White, Marshall, and Weibel, P.S. object to the contents of
26 Plaintiff's Reply on their ex parte motion to substitute, and request the Court to strike the
27 objectionable portions, as follows:

28 For the first time in the reply brief, Plaintiff argues that her claims survive her. (ECF
29 No. 25 at 3-4). New argument raised for the first time in a reply brief is properly stricken

1 because it deprives a party from having an opportunity to properly respond. *See Zamani v.*
 2 *Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“[t]he district court need not consider arguments
 3 raised for the first time in a reply brief”); *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 843, n6
 4 (9th Cir. 2004) (declining to consider argument in reply brief because party had not been given
 5 the opportunity to respond); *United States v. Rearden*, 349 F.3d 608, 614 n.2 (9th Cir. 2003);
 6 *United States v. Rearden*, 349 F.3d 608, 614 n2 (9th Cir. 2003) (“We decline to consider
 7 Rearden’s argument ... because it is raised for the first time in reply”); *Cedano-Viera v.*
 8 *Ashcroft*, 324 F.3d 1062, 1066 n5 (9th Cir. 2003) (“We decline to consider new issues raised
 9 for the first time in a reply brief”).

10 Here, Bishop is placed at a disadvantage by not having an adequate opportunity to
 11 respond. However, Bishop does note the following:

12 **In an action or proceeding by a decedent's personal representative or**
 13 **successor in interest on the decedent's cause of action, the damages**
 14 **recoverable are limited to the loss or damage that the decedent sustained or**
 15 **incurred before death, including any penalties or punitive or exemplary**
damages that the decedent would have been entitled to recover had the decedent
lived, and do not include damages for pain, suffering, or disfigurement.

16 Cal. Civ. Proc. Code § 377.34(emphasis added). *See also Venerable v. City of Sacramento*, 185
 17 F. Supp. 2d 1128, 1131-32 (E.D. Cal. 2002). *See also County of Los Angeles v. Superior*
 18 *Court*, 21 Cal. 4th 292, 304-05, 981 P.2d 68, 76 (1999) (same).

19 This issue is another reason why a proper motion schedule is appropriate, and why an
 20 ex parte motion is improper, despite Plaintiff’s inaccurate claims about Fed. R. Civ. P. 15(a)(1),
 21 which does not permit an additional amended pleading of right. Cases after the rule amendment
 22 have clearly held that an amended pleading is not permitted in this case. *See e.g., Oliver v. In-*
 23 *N-Out Burgers*, 286 F.R.D. 475, 476 (S.D. Cal. 2012) (“Federal Rule of Civil Procedure 15(a)
 24 allows a party leave to amend its pleadings once as a matter of right prior to service of a
 25

1 responsive pleading. Thereafter, “a party may amend that party's pleading only by leave of the
2 court or by written consent of the adverse party”).

3 This Court should also prevent Plaintiff from filing an Amended Pleading without its
4 leave, and without an opportunity for Bishop to brief the issue.

5 Bishop also objects and moves to strike Plaintiff’s use of unpublished and foreign cases
6 to convince this Court to ignore clear Ninth Circuit precedent reflecting that James Jewitt may
7 not be substituted other than in the capacity of a personal representative of the Estate.

8 DATED February 13, 2013.

9 LEE SMART, P.S., INC.

10 By: s/ Marc Rosenberg
11 Attorney for Defendant
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DECLARATION OF SERVICE

I hereby certify that on the date provided at the signature below, I electronically filed with the Clerk of the Court using the CM/ECF system the attached documents, which will send notification of such filing to the following individual:

Therese S Harris tharris@bwmlegal.com

Andre L Verdun andreverdun@crowleylawgroup.com

Ronald Wilcox ronaldwilcox@post.harvard.edu

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED February 13, 2013, at Seattle, Washington.

LEE SMART, P.S., INC.

By: s/ Marc Rosenberg
Attorney for Defendant
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